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IN THE

Supreme Court of the United States

October Term, 1964

No. 725

JACOB MOLINAS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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The petitioner, Jacob Molinas, prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on June 16, 1964, which unanimously affirmed the judgment of conviction rendered February 11, 1963, by the Supreme Court, New York County.

Opinions Below

The decision of the Appellate Division (Appendix A) is reported at 21 A. D. 2d 384. The decision of the Court of Appeals of the State of New York denying petitioner's application for a certificate granting leave to appeal to that Court (Appendix B) is not reported. The decision of Hon. Adrian P. Burke, Associate Judge of the Court of Appeals of the State of New York, reaffirming, upon reargu-

ment, denial of petitioner's application for a certificate for leave to appeal to the Court of Appeals (Appendix C) is not reported. The decision of the Appellate Division denying, without opinion, petitioner's motion for reargument (Appendix D) is not yet reported.

Jurisdiction

The order of the Appellate Division, First Department, was entered on June 16, 1964. An application to Hon. Adrian P. Burke, Associate Judge of the Court of Appeals, for a certificate for leave to appeal to the Court of Appeals was denied on July 27, 1964. A timely petition for reargument was thereupon filed with the Appellate Division on September 2, 1964 and was denied on October 15, 1964.*

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

Questions Presented

In 1960, the District Attorney of the County of New York initiated an investigation into the alleged bribery of college basketball players by persons seeking to control the scoring in games and thereby illicitly winning wagers on such contests. As it progressed, the investigation focused principally upon the activities of petitioner, Jacob Molinas, and three of his accomplices, namely Joseph Hacken, Joseph Green and Aaron Wagman. By the middle of 1961, these

* Rule XV of the Rules of the Supreme Court, Appellate Division, First Department, provides that "motions for reargument shall be noticed for the first, second or third motion day after the appeal has been decided". Petitioner's motion for reargument was filed on September 2, 1964 and returnable on Sept. 9, 1964, the third motion day following the Appellate Division's decision of the appeal.

three accomplices had been indicted as participants in the alleged conspiracy to "fix" games and they subsequently pleaded guilty to the charges against them. One of them, Aaron Wagman, agreed to and did cooperate with the authorities in their continuing investigation directed against petitioner, an investigation which, on May 15, 1962, culminated in the return of a five-count indictment against petitioner.

Theretofore, on January 16, 1962, during the course of the aforesaid investigation, petitioner was secretly interrogated in the absence of counsel. The interrogation was accomplished in the following manner: An accomplice, William Dennis Reed, who had previously retained petitioner as counsel, arranged to meet petitioner in the latter's law office, ostensibly to seek advice with respect to his own position in the investigation. In fact, the prosecutor had induced Reed to cooperate with the authorities and Reed had arranged the meeting at the prosecutor's suggestion. Acting as the agent of the prosecutor, Reed steered his conversation with petitioner to topics suggested by the prosecutor which were designed to elicit incriminating statements from petitioner. Petitioner's statements were recorded by means of an electronic device which the prosecutor had concealed upon Reed's person for that purpose.

At petitioner's trial, which was interrupted for 5 weeks during which time the jury was dispersed, the prosecution introduced in evidence, over objection, a tape-recording and typewritten transcript of Reed's conversation with petitioner. This furnished the element of corroboration of the accomplice testimony essential for petitioner's conviction under the law of New York.

The questions presented are:

1. In light of this Court's recent decisions in *Massiah* v. *United States,* 377 U. S. 201 and *Escobedo* v. *Illinois,*

378 U. S. 478, was the admission of the incriminating tape recording not violative of petitioner's Fifth and Sixth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, because the incriminating statements were deliberately elicited from petitioner by a secret agent of the prosecutor

a) after petitioner had become the primary target of the prosecutor's investigation,

b) in the absence of counsel and without prior warning of his constitutional right to remain silent, and

c) in such a manner that petitioner was not even aware that he was under interrogation?

2. Was the admission of the tape recording not violative of petitioner's Fourth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, because

a) it was the product of surreptitious electronic surveillance by an agent of the prosecutor

b) who had gained entry into petitioner's constitutionally inviolate private law office by misrepresentation

c) for the sole purpose of deliberately extracting incriminating statements from petitioner which, upon being recorded, would furnish the prosecution with the essential corroboration required to convict petitioner?

3. To the extent that this Court's decision in *On Lee* v. *United States,* 343 U. S. 747, may still have validity and suggests a negative answer to Question 2 above, should that decision not be overruled, as has heretofore been suggested by five Justices currently sitting on this Court, namely, Chief Justice Warren in his concurring opinion in

Lopez v. *United States,* 373 U. S. 427, 441, Justice Brennan, with whom Justices Douglas and Goldberg concurred, in his dissenting opinion in *Lopez* v. *United States,* 373 U. S. 427, 446, and Justice Black in his dissenting opinion in *On Lee* v. *United States,* 343 U. S. 747, 758?

4. After a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony have been taken, does not its interruption for five weeks during which time the jury is dispersed and not subject to the control of the Court, so completely destroy the continuity of the trial and deprive petitioner of his constitutional right to due process of law and a fair trial, as to require, as a matter of constitutional law, the granting of his timely motion for a mistrial?

Statement

The District Attorney's intensive investigation of petitioner's activities in connection with the alleged bribery of college basketball players by persons seeking to control the scoring in games in which these players participated culminated, on May 15, 1962, in the return of a five-count indictment against petitioner. Count I of that indictment charged the crime of conspiracy under N. Y. Penal Law §580; Counts II, III and IV charged petitioner with bribing, on three separate occasions, one William Dennis Reed, a player on the basketball team of Bowling Green University, Bowling Green, Ohio, in violation of N. Y. Penal Law §382; Count V charged attempted subornation of perjury (N. Y. Penal Law §1632) in connection with Reed's appearance before the Grand Jury.

On January 8, 1963, petitioner was convicted on all counts of the indictment and, although a first offender, he was

nevertheless sentenced on February 11, 1963 to imprisonment for an aggregate term of 10 to 15 years.*

Petitioner's conviction was secured principally by the introduction of the testimony of the co-conspirator Wagman and the accomplice Reed; additional testimony was given by other basketball players who were also participants in the alleged conspiracy.

However, standing alone, all of this testimony was inadequate, as a matter of law, to warrant petitioner's conviction. This inadequacy stems from New York's statutory requirement (N. Y. Code Crim. Pro. §399) that the testimony of accomplices must be corroborated by other evidence. Since all of the witnesses referred to were involved in the conspiracy and were therefore accomplices, the conviction could not be obtained if corroboration were lacking.

In his attempt to supply the essential element of corroboration, the prosecutor, by means which, as shown at a later point, may be open to question, induced Reed to give his aid and assistance to the prosecuting authorities. To that end, he supplied Reed with an electronic recording device by means of which Reed surreptitiously obtained a tape recording of a conversation he had with petitioner on January 16, 1962, at a time when petitioner—to the knowledge of the District Attorney—was Reed's lawyer

* On October 19, 1964 petitioner applied to the sentencing-Court for a suspension of the execution of the 5 to 7½ year sentence imposed on his conviction on Count IV of the indictment, which sentence was to run consecutively with the 5 to 7½ year concurrent sentences imposed on Counts II and III. On November 9, 1964 the Supreme Court, New York County (Sarafite, J.), granted petitioner's motion to the extent of revoking the sentence previously imposed on Count IV and re-sentencing the petitioner *nunc pro tunc* to 2 to 5 years on said Count, which sentence was to run consecutive with the 5 to 7½ year sentences imposed on Counts II and III; thus petitioner must now serve an aggregate term of 7 to 12½ years.

of record. That this surreptitious recording was obtained solely for the purpose of supplying the legal requirement of corroboration is, in effect, conceded by the District Attorney in his brief to the Appellate Division where, on page 48, it is stated:

> "The taped conversation provided a major portion of the corroboration needed to substantiate legally the overwhelming, complete and detailed testimony of 9 college players and one co-conspirator, Aaron Wagman."

Petitioner's trial counsel objected to the introduction into evidence of this tape recording and a transcript thereof on the ground, among others, that its introduction violated petitioner's rights under the Constitution of the United States (1624*).

Whether the objection was well taken is one of the principal questions petitioner seeks to have this Court review.

The Manner in Which the Self-Incriminating Tape Recording Was Secured:

In January 1962, a detective approached Reed in Bowling Green, Ohio, and, after a conference with university officials, Reed agreed to return to New York with the officer and to appear before the Grand Jury (1483-4). Before leaving Ohio, however, Reed notified petitioner, at the time a member of the Bar of the State of New York, of the place and time of their scheduled arrival (1484-5, 1828-9). Reed had previously retained petitioner as his counsel (1468-70, 1795-7, 1991-2) to advise him with respect to his position in the investigation. He wished to confer with peti-

* All references, unless otherwise identified, are to pages of the original Record on Appeal to the Appellate Division, First Department, of the Supreme Court of the State of New York.

tioner with respect to his testimony before the Grand Jury (1828).

On the evening of January 15, 1962, petitioner met Reed and the officer at Newark Airport and, after petitioner telephoned the District Attorney's office, Reed accompanied petitioner to New York, where they spent the night in the Martinique Hotel in Manhattan (1491, 1830).

That evening Reed discussed the situation with petitioner and the latter advised him of his rights and informed him that he would accompany Reed to the District Attorney's office the following morning (1836). According to Reed (1492-4), petitioner also sought to influence Reed's testimony before the Grand Jury.

The following day petitioner appeared with Reed at the New York County District Attorney's office in his capacity as Reed's attorney. Petitioner was informed by the prosecutor that he would not be permitted to represent Reed. The prosecutor, Reed and petitioner thereupon went before Judge Dickens, of the then Court of General Sessions (1840), at which time the Judge suggested that it might be unethical for petitioner to represent Reed inasmuch as the investigation was directed against petitioner (1860; People's Exhibit 35, p. 20). According to Reed, petitioner was still attempting to show that he was entitled to represent him when "there was some commotion" (1860) and Reed was "taken away" by the prosecutor and detectives (1497, 1860). Although Reed desired counsel (1861), he was taken to the prosecutor's office for questioning and was not permitted to call petitioner (1859).

Reed was questioned for "a very long time" (1843) by at least 8 persons (1846) in connection with his participation in the basketball "fixing". Although Reed was without counsel during this questioning, he "assumed that Mr.

Molinas was still my lawyer, but at that time I was becoming quite unsure" (1840).

The District Attorney informed Reed that he would not be prosecuted if he cooperated and would testify against petitioner (1845, 1849). Nevertheless, throughout the initial stages of the protracted questioning, Reed took the position that he did not wish to make any statement (1848-9). He persisted in his refusal to make statements implicating himself or petitioner until, after more than six hours of questioning, he "broke down" (1849-50).

After several hours of interrogation, Reed was taken to the Legal Aid Society (1858-61). After a brief consultation with a Legal Aid attorney, Reed was questioned further and was given a "rather eloquent explanation of just what my circumstances were" by a member of the District Attorney's office (1862). Thereafter, he was granted immunity from prosecution and he agreed to cooperate (1853).

As noted above, however, Reed's testimony as an accomplice would have been legally insufficient to convict petitioner. Apparently recognizing the legal deficiency of their case against petitioner, the prosecuting authorities decided to have Reed meet with petitioner and, with the aid of an electronic recording device which they supplied to Reed, surreptitiously record a conversation during the course of which Reed would attempt to extract incriminating statements. As Reed testified,

> "They told me that this would be the best thing for me to do, to, in a way, make up for some of the things that I had done. Mr. Scotti [Chief Assistant District Attorney] explained that sometimes a person may do something and then comes a time when they feel like becoming penitent, if you will, and he told me it would

> be a good thing for me to go out and so, as much as I could, to help myself, to show that I was willing to cooperate as fully as I could" (1864).

Reed was thereupon equipped with a recording device concealed under his shirt, instructed in its use, and told to call petitioner and arrange for an immediate meeting at the latter's law office (1870, 1504). Reed agreed to cooperate because "there was no other way. I mean I was frightened" (2075).

The District Attorney suggested the type of conversation which Reed was to engage petitioner in, as well as the subjects to be covered (1865-7, 1876). Specifically, Reed was instructed to talk about perjury during his conversation and "to find out where Mr. Molinas would stand in the event I committed perjury" (1867). Of course, if Reed's trial testimony is to be credited, the District Attorney already knew petitioner's position on this matter for Reed had related to him the conversation of the preceding evening during which petitioner had allegedly attempted to suborn perjury.

Reed went directly from the District Attorney's office to petitioner's office and, in the guise of consulting him as his attorney with respect to his position in the investigation, Reed elicited incriminating statements from petitioner. The surreptitiously-made tape recording and the transcript thereof provided the corroboration required to convict petitioner on each of the five counts of the indictment.*

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* While petitioner may lack standing to complain of the prosecution's improper refusal to permit Reed to consult with counsel, the manner in which Reed was induced to cooperate and assist in the incrimination of petitioner is relevant for the light it sheds upon the prosecution's disregard of the rights of suspects and its illegal and improper course of conduct which culminated in the self-incriminating tape recording.

Reasons for Granting the Writ

1. In *Spano* v. *New York*, 360 U. S. 315, this Court reversed a state criminal conviction on the ground that, in the circumstances presented, it was error of constitutional dimensions to admit into evidence, over objection, a confession which the police deliberately elicited from the accused after indictment and in the absence of the accused's retained counsel. The majority found it unnecessary to decide whether the fact that the accused was interrogated after indictment in the absence of counsel, standing alone, was enough to render the confession inadmissible under the Fourteenth Amendment. Four Justices, however, believed that it was.

Shortly after *Spano*, the New York Court of Appeals held that a statement obtained from an accused after indictment in the absence of counsel, although not amounting to a confession, was nonetheless inadmissible as the product of testimonial compulsion (*People* v. *DiBiasi*, 7 N. Y. 2d 544). The *DiBiasi* case was soon followed by *People* v. *Waterman*, 9 N. Y. 2d 561, 565, where the Court held (in language quoted with approval by this Court in *Massiah* v. *United States*, 377 U. S. 201, 205):

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

The New York Court of Appeals' expanding concept of the right to counsel next led it to hold inadmissible an otherwise voluntary statement made by an accused to a police officer after arraignment but before indictment

(*People* v. *Meyer*, 11 N. Y. 2d 162). The accused's failure to request counsel after being advised of his rights was held not to be a waiver of those rights (*People* v. *Meyer*, *supra*).

The protection afforded by the right to counsel was logically extended yet another step when it was held to encompass pre-arraignment statements elicited during interrogation in the absence of counsel at a time when the accused had become the principal suspect of the prosecution's investigation (*People* v. *Donovan*, 13 N. Y. 2d 148; *People* v. *Robinson*, 13 N. Y. 2d 296).

The *Robinson* case, *supra*, is factually similar to the case at bar. The accused, arrested on a sham vagrancy charge and questioned in connection with a homicide, steadfastly maintained his innocence. His co-defendant, however, had implicated him and the police placed an informer in a cell adjoining the accused and stationed two detectives hidden within hearing distance. The informer-agent engaged the accused in a conversation and extracted what amounted to a full confession of the homicide. At the accused's trial, the detectives were permitted to testify with respect to the incriminating statements they had overheard. This was held to be reversible error.

The expansion and development of the right to counsel found in the decisions of the New York Court of Appeals has its counterpart in the decisions of this Court (*Massiah* v. *United States*, 377 U. S. 201; *Escobedo* v. *Illinois*, 378 U. S. 478).

In *Massiah*, this Court held that incriminating statements deliberately elicited by Federal agents from petitioner after indictment and in the absence of counsel could not constitutionally be used as evidence against him. After Massiah had been indicted and released on bail, Federal

agents secretly secured the cooperation of his co-defendant Colson, and installed a concealed radio transmitter in Colson's automobile. Thereafter Colson and petitioner held a lengthy conversation while seated in Colson's parked automobile. By prearrangement with Colson and unknown to petitioner, an agent, stationed in another car parked some distance away, listened over the radio to the entire conversation. During the course of this conversation petitioner made several incriminating statements which were overheard by the agent. The agent was permitted to testify to these statements despite repeated objection by petitioner's trial counsel.

In reversing petitioner's judgment of conviction, this Court noted that the protection afforded by the right to counsel extends to "indirect and surreptitious interrogation as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a Government agent" (377 U. S. at 206).

In the *Escobedo* case, *supra,* this Court noted, as did the New York Court of Appeals in *Donovan* that "no meaningful distinction could be drawn between interrogation of an accused before and after formal indictment" (378 U. S. at 486). Accordingly, it held the accused's right to counsel attaches as soon as the prosecution's investigation is no longer a general inquiry into an unsolved crime, but has begun to focus upon a particular suspect. Incriminating statements elicited from an accused during interrogation in the absence of counsel after the investigation has focused upon him are therefore constitutionally inadmissible.

We respectfully suggest that the District Attorney has not heeded the teachings of these cases. Rather, he continues to adhere to the investigatory procedure no longer condoned but which he extolled in his testimony given in

1955 before the Celler Congressional Committee investigating wire-tapping.* At that time, District Attorney Frank Hogan "credited wire-tapping with unearthing the large-scale corruption involving 35 top college basketball players who were fixing basketball games for pay" (Dash, Schwartz & Knowlton, "The Eavesdroppers", p. 37).

If the prosecution is still permitted to secure incriminating statements from an accused who is the primary target of its investigation by indirect and surreptitious interrogation, the force of this Court's decisions expanding and safeguarding the right to counsel would be nullified. Indeed, to sanction the practices of the prosecutor disclosed by the facts of the case at bar "would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination'" (*Escobedo* v. *Illinois*, 378 U. S. 478, 487).

2. Whether the fruits of surreptitious electronic surveillance are admissible in a state criminal trial raises "grave constitutional questions under the Fourth and Fifth Amendments" (*Lopez* v. *United States*, 373 U. S. 427, 441 [Warren, *C.J.*, concurring in result]).

This Court was most recently confronted with these questions, in the context of an appeal from a federal con-

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* The District Attorney employed a technique virtually identical to that of the instant case in the recent bribery prosecution of Ralph Berger. In an account of the trial in the New York Times (November 5, 1964, p. 53, col. 2), it is noted that the trial judge instructed the jurors that the testimony of the principal witnesses for the State, who were accomplices, "would require independent corroboration" and that "to supply corroboration Assistant District Attorney Jeremiah B. McKenna had put several policemen on the stand and had played for the jury a tape recording of eavesdropped conversations in which Berger was a participant."

viction, in *Lopez* v. *United States,* 373 U. S. 427. A discussion of the *Lopez* case and the factors which distinguish it from the case at bar is relevant, however, since any constitutional bar to the admissibility of such surreptitiously obtained evidence would be equally applicable to state criminal trials (*Mapp* v. *Ohio,* 367 U. S. 643).

In *Lopez,* petitioner made an unsolicited bribe offer to an Internal Revenue agent who had entered his premises after the agent had given full notice of his authority and purpose—to investigate possible evasion or delinquency in the payment of federal taxes. Petitioner offered the agent $420 to "drop" the case. The agent initially declined to accept this money, but finally accepted it after petitioner's continued importunities. Petitioner asked the agent to return on a subsequent date. The agent promptly reported the conversation and his acceptance of the proffered bribe to his superiors, who instructed him to keep his appointment with petitioner and to "pretend to play along with the scheme". On his return visit to petitioner's place of business, the agent was equipped with a concealed recorder which he used to tape record his conversation with petitioner. At trial, the agent testified to his conversation with petitioner and the tape was introduced to corroborate this testimony. The majority of this Court rejected petitioner's contention that the admission of the recording thus secured was in violation of his rights under the Fourth Amendment.

Mr. Justice Brennan's dissenting opinion, concurred in by Justices Douglas and Goldberg, stressed the "intolerable anomaly" resulting from the fact that

> "while conventional searches and seizures are regulated by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute, electronic surveillance as involved in the instant case, which

poses the greatest danger to the right of private freedom, is wholly beyond the pale of federal law" (373 U. S. 427, at 471).

Accordingly, the dissenting Justices would have held that the admission of the fruits of surreptitious electronic surveillance violated the prohibitions contained in the Fourth Amendment and the "comprehensive right of privacy" secured to the individual by the interaction of the Fourth and Fifth Amendments.

In his separate opinion concurring in the result, Mr. Chief Justice Warren noted that he shared the dissenters' opinion that "the fantastic advances in the field of electronic communications constitute a great danger to the privacy of the individual; [and] that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments" (373 U. S. 427, at 441). He did not, however, share the dissenters' view that "all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods" (*Ibid.*). He found "nothing unfair" (*Id.*, at 442) in the procedure adopted because the agent had truthfully disclosed his authority and purpose before petitioner made the unsolicited bribe offer; the agent would have been free to testify as to the unsolicited offer; and the "only purpose the recording [of the subsequent conversation] served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust" (*Ibid.*).

The prosecution's tactics in the case at bar readily distinguish it from the *Lopez* case and are of the type condemned by the Chief Justice in his concurring opinion. Thus, in addition to the infringement of petitioner's right to counsel, discussed above, the following factors are significant:

The case at bar	*The Lopez case*
a) The agent-accomplice gained entry into petitioner's private office by deliberately misrepresenting his true purpose and purporting to seek advice with respect to his own involvement in the prosecution's investigation.	The agent truthfully disclosed that he was a federal agent conducting an investigation of petitioner's affairs.
b) The accomplice deliberately steered the conversation to topics suggested by the prosecutor, designed to elicit incriminating statements.	Petitioner made an unsolicited bribe offer to the agent.
c) But for the presence of the concealed recording device, petitioner took no risk in speaking freely to the accomplice-agent, since a conviction cannot be obtained in New York on uncorroborated accomplice testimony.	Petitioner risked prosecution and conviction by offering an unsolicited bribe to a federal agent, since the agent's testimony would have sufficed to convict.
d) The recording of incriminating statements deliberately elicited from petitioner was sought not to protect the credibility of the accomplice-agent, but to furnish the prosecution with the lacking essential element of corroboration required by the law of New York.	The "only purpose" of the recording was to protect the credibility of the federal agent.

A review of the instant case will afford this Court the opportunity to delineate more clearly the use, if any, which may constitutionally be made of surreptitiously obtained tape recordings of conversations between government

agents and an accused. A definitive statement by this Court is urgently needed since the tactics disclosed in the case at bar are apparently still in widespread use by prosecuting authorities.

3. In his dissenting opinion in *Lopez* v. *United States*, 373 U. S. 427, 447, Mr. Justice Brennan expressed his belief that this Court's decision in *On Lee* v. *United States*, 343 U. S. 747, was "error, in reason and authority, at the time it was decided; that subsequent decisions and subsequent experience have sapped whatever vitality it may once have had; [and] that it should now be regarded as overruled". Five justices sitting on this Court have expressed the same opinion.

To the extent, therefore, that this Court's decision in *On Lee* may still have validity and suggests that the surreptitiously obtained recording of petitioner's incriminating remarks is not a violation of his Fourth Amendment rights, we respectfully submit that it should be overruled for the reasons set forth so cogently in Mr. Justice Brennan's comprehensive dissenting opinion in the *Lopez* case, *supra*. A review of the instant case will place this issue, which has a vital effect upon law enforcement procedures generally, before the Court.

4. On Friday, November 30, 1962, after five weeks of trial and the taking of almost 3,000 pages of testimony, the Court recessed until the following Monday. Over the weekend the Trial Judge was stricken with a kidney stone attack and his subsequent hospitalization and period of recuperation prevented resumption of the trial until January 2, 1963. During this five-week interval the jury was dispersed and not under the control or guidance of the Court.

When the Court finally reconvened, and before any further testimony was taken, petitioner moved for a mistrial (2933-4, 2941) on the ground that continuation of this trial after such a long interruption would be fundamentally unfair and would deprive him of his constitutional right to due process of law and a fair jury trial. His motion was denied (2942).

On appeal, the Appellate Division held that "the mere lapse of time, without any evidence of any resulting prejudice under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial". This, we submit, was error of constitutional dimensions.

We submit that petitioner was not required to make any further showing of "resulting prejudice" beyond the five-week interruption of the trial. Such a long interruption during which the jury is dispersed so completely destroys the continuity of the trial as to require, as a matter of law, the granting of a motion for a mistrial.

However, there was, in fact, evidence of prejudice to petitioner. The day prior to the interruption, the People rested their case after the taking of almost 3,000 pages of testimony. The People's case consisted almost exclusively of accomplices' testimony, and the credibility of the witnesses was one of the principal issues submitted to the jury (3296).

The key to the issue of credibility lay in the jury's impression of the witnesses' demeanor on the stand, as well as their comparison of the testimony given during direct and cross-examination. The five-week interruption deprived petitioner of his right to be tried by a jury competent to evaluate the foregoing factors. The jury could not possibly have retained a clear and accurate recollection of the voluminous testimony, the nuances thereof and the

variations and inconsistencies appearing therein. Their impression of the witnesses must necessarily have dimmed, if not faded out altogether, during this period when they were permitted to once again resume their normal daily activities.

The question of constitutional law presented is a novel one and, while the custom and practice of many trial courts is to grant a mistrial under circumstances such as those presented by the instant case, there should be an expression of this Court on a matter so fundamentally affecting the rights of defendants in criminal jury trials.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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